IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-372

LAWRENCE MOSKOWITZ and MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

v.

CHARLES J. HYNES, Deputy Attorney General of the State of New York,

Appellee.

REPLY BRIEF
TO APPELLEE'S MOTION TO DISMISS OR AFFIRM APPELLANTS' JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

The statement of the case has been presented to the Court both in Appellants' Jurisdictional Statement and in Appellee's Motion to Dismiss. There are no additions necessary. Three points raised by Appellee require clarification, however.

While it is correct that Appellant Moskowitz "made no motion to quash the subpoena and did not comply with it" [*Appellee's Motion to Dismiss or Affirm* at page 4 (hereinafter, *"Motion to Dismiss"*)], the Court should be aware that he was not under any duty to do so. As the trial court itself stated:

"At the threshold, the Court would note that the Court of Appeals, in the seminal case of *Matter of Friedman v. Hi-Li Manor Home for Adults* (42 NY 2d 408), decided July 7, 1977, has approved the procedural posture adopted by respondents [appellants herein] of awaiting the institution of proceedings to compel compliance and then for the first time raising objection." *Matter of Hynes v. Moskowitz,* 92 M2d 495, 497, 401 NYS 2d 398 (Sup. Ct., Rockland Co., 1977).

Appellee is not heard to complain of the procedural posture now, nor did he then. *Id.*

Next, the Appellee indicates, somewhat confusingly, that the trial court, while ordering compliance with the subpoena of Appellee, "upon a motion by the Appellants, . . . modified its order to direct that the subpoenaed records be produced at the office of the County Clerk to be maintained there while the appellants appealed to the Court of Appeals." *Motion to Dismisss* at 6.

Properly, the motion to the trial court should have been described as a motion for a stay pending appeal pursuant to the automatic stay provisions of Civil Practice Law and Rules [CPLR] §5519(c). Such a stay requires the designation of a depository for the property concerned and this is what the trial court did to effect the requested stay pending appeal.

Lastly, Appellee has chosen to acquaint this Court with the showings made to the trial court to support the issuance of the subpoena. *Motion to Dismiss* at 5. The validity of issuance was not challenged below and is not questioned here. The inclusion of this long paragraph from the lower court opinion is, therefore, utilized solely for shock value. Suffice it to say that the dates of the events alleged therein are for periods of time *subsequent* to the dates covered by the request for books and records in the subpoena.

In all other respects, the facts are as presented to this Court.

POINT I

THE WITHIN APPEAL IS NOT MOOT

Appellees argue that since the books and records have already been turned over to the Deputy Attorney General, the issues raised herein are moot. *Motion to Dismiss* at 8. No other citation for this unique interpretation of mootness principles is proffered other than a suggested comparison to *DeFunis v. Odegaard,* 416 US 312 (1974).

This attempt to defuse a potentially damaging determination has been tried by Appellee before. In the case of *Maison & Co. v. Hynes,* 50 AD 2d 13 (1st Dept., 1975) the Appellate Division was faced with the identical argument by Appellee herein following the failure of a court below to issue an order for a stay pending appeal. The subpoenaed books and records were then surrendered (to a Grand Jury). Thereafter, on appeal, a motion to dismiss on the grounds of mootness was made. It was denied by that appellate court.* *In Re: Maison & Co. (Hynes),* 174 NYLJ 77, October 20, 1975, p. 5, col. 1.

Mootness is a singularly improper argument in the case at bar. Appellee still holds the books and records of Appellants. A decision by this Court in favor of Appellants would bring the return of those books and records.

Moreover, such a decision would then allow the Appellants to make proper protective motions to suppress any evidence so obtained.

Both on the law and on the facts the case at bar is not moot. Just recently, in a similar case, the court, though dismissing for want of a substantial federal question, did not accept the mootness argument of Appellee. *Far*

*A copy of the first page of Appellee's brief to the court is appended hereto as Appendix I. It clearly indicates the related state of affairs.

Rockaway Nursing Home v. Hynes, 78-276, ____ US ____, 24 CrL 4036 (October 10, 1978).*

POINT II

A SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED.

Appellee has devoted the majority of his motion to arguing that the current New York practice of allowing a prosecutor, operating solely independent of and without a Grand Jury, to seize possession of subpoenaed books and records is not more than coordination with existing federal law.

> "In fact, the New York statutes merely codify federal law and practice. Therefore, the appellant's challenge to the constitutionality of these statutes is frivolous." *Motion to Dismiss* at 17.

Yet, undisputed and untouched stands Appellants' original assertion:

> "Compare the powers of Federal prosecutors. Under federal law it is only a *Grand Jury* which may take possession of documents subpoenaed under a subpoena *duces tecum. In Re: Horowitz,* 482 F.2d 72 (2nd Cir., 1973). Moreover, this is not an explicitly stated statutory power, but one which is implied. *There is no federal rule which permits federal prosecutors not operating under the unique powers of the Grand Jury to take possession of documents called for under a subpoena.* The only independent power of a federal prosecutor to even subpoena records is found in the Federal Rules of Criminal Procedure, Rule 17 (c). Under that rule, only the Court may permit an inspection before *itself,* by *both* parties, either prior to trial or prior to their admission into evidence of documents subpoenaed. It is important to note that this scheme is *reciprocal,* available to either party equally, and entails no Sixth Amendment problems. This is not the case in the New York statutes, which, rather than conforming themselves to federal law, create new law by allowing a prosecutor, in a non-reciprocal situation, to subpoena and take possession . . . without the order of the Court, for extended periods of time." *Jurisdictional Statement,* at page 12 [emphasis supplied].

*The issues raised in *Far Rockaway Nursing Home v. Hynes, supra,* related to a Grand Jury subpoena *duces tecum,* however, not a non-judicial office subpoena such as the one at bar. The powers of the Grand Jury are not present in this case and Appellee's silence on this point validates the distinction.

In this light, Appellee's expressed desire to take solace in cases dealing with administrative agencies is understandable. However, just as above, Appellee has failed to counter the arguments of Appellants and indicate to this Court why the powers of such agencies should in any way be analagous to his.

Judge Jasen, an ardent supporter of Appellee's position throughout the judicial history of the new statute and the author of the decision appealed from below, stated the thesis most succinctly:

> "The fact that, in several instances, the Legislature explicitly conferred upon established regulatory agencies the authority to audit the books and records of the enterprises to be regulated, is scarcely relevant to this case. We do not deal here with regulatory agencies, whose jurisdiction is very limited, but with the office of the Attorney General, and his power and duty to investigate into matters touching the public peace, safety and justice. There are obvious differences between the statute authorizing exceptional investigation and statutes authorizing regulatory agencies to conduct positive audits." *Windsor Park Nursing Home v. Hynes,* 42 NY 2d 243, 397 NYS 2d 723, 726 (1977) [*Jasen,* J., dissenting]

A new argument now surfaces in its stead. The court is now to equate the powers of Appellee with the powers of Congress *itself. Motion to Dismiss* at 9. Separation of Powers is thrown to the wind as Appellee argues that since one of the functions of the Executive Law is to recommend legislation then surely the deputies of his Attorney General must possess investigative power equal to that of the Legislature.

This argument, almost too incredible to take seriously, is curious in that it overlooks the fact that Appellee's function is of special *prosecutor,* and that, unlike the Legislature he can prosecute and convict on the information he receives. That Appellee wears two hats is manifest. Yet just as true is that they are worn *simultaneously,* not separatively.

It is with the same aplomb that Appellee sidesteps the misdemeanor portion of Executive Law §63(8). He argues:

> "While it is true that Section 63(8) provides for such a [criminal] sanction, it is hardly correct that this leaves a subpoenaed party without judicial protection." *Motion to Dismiss* at 11.

Appellee then continues on to chide Appellant for bringing the threat of criminal sanctions upon himself by failing to move to quash under CPLR §2304. The fact that Appellants are under no duty to move to quash, appears to be beyond Appellee's cognizance. *Matter of Friedman v. Hi-Li Manor, supra, Matter of Hynes v. Moskowitz, supra* (Rockland Co.). Appellee would shift all burdens to Appellants yet readily admit that the subpoena was self-enforcing:

> "It was because of his deliberate choice not to seek judicial intervention, but, instead, to ignore the subpoena's command, that *Moskowitz could have been proceeded against criminally without prior judicial scrutiny of the subpoena.* In fact, this *possibility* did not occur." *Motion to Dismiss* at 12.

This facile transferring of burdens involves constitutional problems which Appellee chooses to ignore. Fortunately, these problems with the new statute have not escaped noted commentators of New York law:

> "The fact that CPLR 2305(c) allows the government to use a subpoena *duces tecum* to compel a person to surrender possession of private papers and records without initially obtaining a court ruling that the request is reasonable, and the fact that it places the burden on the subpoenaed party to challenge the government's demand, raises important questions concerning the constitutionality of the recent amendment." *2A Weinstein-Korn-Miller, New York City Practice,* Par. 2305.6.

In closing, Appellants would only leave the Court with the questions left undisturbed by Appellee and relating to last term's decision in *Marshall v. Barlow's, Inc.,* ____ vs.____ 56 LED 2d 305, 98 S.Ct. 1816 (1978):

> "The 'inspection' of documents to be made in *Marshall v. Barlow's Inc., supra,* was on-premises, and the Court felt that such an inspection required a warrant. This 'inspection, examination and audit' envisioned by Executive Law §63(8) and CPLR §2308(c) takes place off the premises, after the documents have been removed from the custody of their rightful owner. If the on-premises inspection demands a warrant, can the off-premises post-seizure inspection require any less? If the on-premises, non-custodial inspection requires an administrative warrant supplying the requisite showing under *Camara v. Municipal Court,* 387 US 523, 538 (1967) ['that reasonable legislative inspections are satisfied with respect to a particular [establishment]. . . .' *Marshall v. Barlow's, Inc., supra* 3032.] Then, perhaps, a full, probable cause showing should be required of Appellee, whose powers are both

civil and criminal, and who seeks to take possession of the documents to be inspected and bring them back to his office." *Jurisdictional Statement* at 16.

In conclusion, we believe that the issues raised by the statutes questioned herein are of substantial importance to the State of New York and other jurisdictions as well. They create a situation unique to both federal and state practice. Appellee now possesses greater powers than the United States Attorney and may utilize those powers without judicial intervention. The jurisdiction of this Court is proper and the questions presented appropriate for review.

The motion of Appellee should be, in all respects, denied.

Dated: New York, New York
October, 1978

Respectfully submitted,

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APPENDIX 1

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of
MAISON & CO.,
Petitioner-Appellant,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,
Respondent.

RESPONDENT'S BRIEF

Statement

This is an appeal from an order of the Supreme Court of New York County (Lang, J.), entered August 19, 1975, denying a motion brought by Maison & Co. to quash a grand jury subpoena addressed to its bank for the bank's records of the Maison & Co. account for a four-month period. In an order entered September 23, 1975, this Court denied Maison & Co's motion for a stay pending appeal. After this stay was denied, the bank supplied the subpoenaed records to the Deputy Attorney General. The respondent then moved in this Court for an order dismissing this appeal as moot. This motion was denied in an order entered October 16, 1975.